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# Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 628 271.

JOHN McMULLEN, PETITIONER,

vs.

JULIA E. HOFFMAN, EXECUTRIX OF THE LAST WILL  
OF LEE HOFFMAN, DECEASED, RESPONDENT.

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Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit, under  
the Act of Congress of March 3, 1891.

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JOHN McMULLEN,  
*Petitioner.*

L. B. COX,  
WM. A. MAURY,  
*Counsel for Petitioner.*

IN THE  
**Supreme Court of the United States.**

**OCTOBER TERM, 1897.**

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JOHN McMULLEN, PETITIONER,

*vs.*

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*To the Honorable, the Supreme Court of the United States :*

The petition of John McMullen, a citizen of the State of California, respectfully shows :

That on the 19th day of April, 1895, your petitioner commenced a suit in the Circuit Court of the United States for the District of Oregon, and by the bill of complaint filed in said suit, your petitioner sought a decree, for a dissolution of the copartnership theretofore existing between him and

said Lee Hoffman, for an accounting of the affairs of said copartnership, and for your petitioner's share of the assets of said copartnership, and of the profits realized thereby.

It was alleged in said bill of complaint and set forth therein, as your petitioner's cause of suit, that on the 6th day of March, 1893, your petitioner and said Lee Hoffman entered into a written agreement under their hands and seals, that they would share equally in the contract for manufacturing and laying pipe from Mt. Tabor to the head works of the Bull Run water system, for the City of Portland, which had theretofore been awarded by the Water Committee of said City, upon a joint bid put in by your petitioner and said Lee Hoffman, in the name of Hoffman & Bates, under which said Lee Hoffman carried on business in the State of Oregon, and which said contract was about to be formally entered into by the City of Portland and Hoffman & Bates; that your petitioner and said Lee Hoffman should each of them furnish and pay one-half of the expenses of executing said contract, and each of them receive one-half of the profits, or bear and pay one-half of the losses which should result therefrom, and further, that in case either your petitioner or said Lee Hoffman should get a contract to do, or should do, any other part of the work upon said Bull Run water system, the profits and losses of such contract or work should be borne by your petitioner and said Lee Hoffman equally; that on the 10th day of March, 1893, the City of Portland entered into a written contract with said Lee Hoffman, acting in the name of Hoffman & Bates and for the joint interest of himself and your petitioner, for the execution of the work covered by the bid before mentioned; that your petitioner and said Lee Hoff-

man entered upon the performance of said work, as copartners, and executed the same, and in so doing earned a profit exceeding \$35,000.00; that 90 per cent. of the contract price for said work was paid by the City of Portland, and 10 per cent. thereof was retained by said City in accordance with the provisions of said contract; that various work, not embraced in said contract, was performed by your petitioner and said Lee Hoffman, as copartners, upon said Bull Run system of water works; that all payments for said work had been made to said Lee Hoffman, who had kept all books of account, and that he refused to deliver to your petitioner his share of the profits of said work, or to render him any account of said partnership transaction; that the assets of said partnership, in addition to said sum of \$35,000.00, or more, and 10 per cent. of the contract price of said work of manufacturing and laying pipe, which was retained and unpaid by the City of Portland, consisted of certain plant, tools and other property, in the State of Oregon, of the value of \$5,000.00, or thereabouts.

Said Lee Hoffman filed an answer to said bill of complaint, in which he admitted the agreement of copartnership entered into by him and your petitioner on April 6, 1893, but pleaded, amongst other defenses to your petitioner's suit, that he and your petitioner had entered into a conspiracy against said City of Portland, prior to the putting in of bids for the work embraced in said Bull Run system of water works, whereby, in order to defraud said City, they agreed with each other, in effect, that they would each bid in apparent competition with the other, for the various parcels of work to be let; that in regard to the work of manufacturing and laying pipe, your petitioner had re-

quired said Lee Hoffman to lower a bid he (said Hoffman) had proposed to submit, about \$13,000, and said Hoffman had required your petitioner to increase a bid which he (your petitioner) had proposed to submit, about \$98,000.00, and that said bids so increased and decreased, respectively, were submitted to said Water Committee; and that by reason of the fraudulent practices of said Hoffman and your petitioner in the matters before stated, your petitioner was not entitled to recover from said Hoffman, in said suit.

Divers portions of the answer of said Lee Hoffman were excepted to by your petitioner, for impertinence, scandal and insufficiency, which exceptions were sustained in part and overruled in part. At this stage of the case, said Lee Hoffman died, and the cause was revived against Julia E. Hoffman, as executrix of his last will and testament. Thereupon your petitioner filed amendments to his bill of complaint and a general replication to the answer. The cause was thereupon referred to an examiner to take the proofs, which was duly done, and thereupon the Court, on June 23, 1896, made special findings of fact, and thereon a decree was entered in favor of your petitioner in said cause (record, vol. 1, pp. 91-6), determining that your petitioner and said Lee Hoffman had earned on said contract with the City of Portland for manufacturing and laying pipe \$509,825.22, and for extra work \$14,496.74; that your petitioner and said Lee Hoffman had earned in the business of conducting a camp store and a boarding-house for workmen, and by the sale of live stock belonging to them, from interest on money, and from other sources, a profit of \$15,339.76; that your petitioner and said Lee Hoffman had accumulated other assets, consisting of plant and tools, at a cost price of \$6,234.60; of furniture and

fixtures, at a cost price of \$167.85; of camp fixtures, at a cost price of \$1,246.16; and of miscellaneous accounts amounting to \$188.75; and also of a claim against the City of Portland, for work outside of said contract for manufacturing and laying said pipe, which claim had been disallowed by said City; and in and by said decree your petitioner was awarded judgment against the defendant Julia E. Hoffman, as executrix of the last will of Lee Hoffman, deceased, for the sum of \$52,241.18, and your petitioner was decreed to be a half owner with said defendant of the plant, tools, office furniture, fixtures, camp equipments and other property above mentioned, and also of the disputed claim of \$16,961.25, against the said City of Portland. It was further decreed that neither of the parties to said cause should recover costs from the other.

Your petitioner further shows, that both of the parties in said suit appealed from the decree rendered therein—the defendant, from the whole of said decree, so far as the same was adverse to her, and your petitioner from the allowance of \$12,000 made by the Court, as a salary to said Lee Hoffman for his services in superintending the execution of the work before mentioned, and also from the disallowance by the Court of your petitioner's claim for interest on the moneys withdrawn by said Lee Hoffman from the partnership business and withheld from your petitioner, and from the refusal of the Court to award your petitioner his costs of suit.

Your petitioner further shows, that said appeals came on regularly for hearing before the Circuit Court of Appeals for the Ninth Circuit, on the 15th day of February, 1897, and were argued by counsel for the respective parties; and

on the 4th day of October, 1897, said Circuit Court of Appeals rendered its decision, reversing the decree of said Circuit Court, and declining to consider the appeal of your petitioner (record, vol. 2, p. 595) ; that on the 5th day of February, 1898, your petitioner duly filed in said Circuit Court of Appeals a petition for a rehearing of said appeals, which petition was denied on the 28th day of February, 1898, and the decree was entered in said cause by said Circuit Court of Appeals, reversing the decree of said Circuit Court before mentioned.

Your petitioner respectfully represents that in the rendition of said decree of the Circuit Court of Appeals for the Ninth Circuit manifest errors occurred, and now exist, to the great damage of your petitioner, in the following particulars, to wit :

First. Said Circuit Court of Appeals held and decided that your petitioner was not entitled to recover in his suit, for the reason that in bidding for the work before mentioned, he put in a bid in concert with said Lee Hoffman, larger than his, which was not submitted in good faith, but was put in pursuant to a fraudulent agreement and conspiracy between your petitioner and said Hoffman, to deceive the Water Committee of the City of Portland, in regard to the bid put in by your petitioner and said Hoffman, in the name of Hoffman & Bates, and for the purpose of defrauding said City. Your petitioner denies that any such agreement or conspiracy was ever entered into, or that he ever put in a bid for any such purpose ; and your petitioner submits that if there had been any foundation whatever for such finding, said alleged fraudulent agreement



and conspiracy and fraudulent bidding could not affect the right of your petitioner to receive and recover his share of the profits realized in the partnership business carried on by your petitioner and said Lee Hoffman, or your petitioner's right to receive and recover his share of the assets of the partnership formed by your petitioner and said Lee Hoffman on March 6, 1893, inasmuch as all of said alleged fraudulent bidding and fraudulent action or conduct on the part of your petitioner and said Lee Hoffman would have been past transactions, completely ended before the formation of said partnership between your petitioner and said Lee Hoffman, and before they commenced the performance of any of the work from which the partnership profits were realized.

Your petitioner further represents that said decision of the Circuit Court of Appeals, is, in this respect, at direct variance with the principles heretofore laid down by this court in its decisions, notably in the cases of *McBlair vs. Gibbes*, 17 How., 232; *Brooks vs. Martin*, 2 Wall., 70; *Planters' Bank vs. Union Bank*, 16 Wall., 438; *Railroad Company vs. Durant*, 95 U. S., 576; and *Armstrong vs. Bank*, 133 U. S., 434. Said decision of the Circuit Court of Appeals is also at variance with the determinations of other federal courts, in like cases, as appears from *Burke vs. Flood*, 6 Saw., 220; *Western Union Telegraph Company vs. Union Pacific R. R. Co.*, 1 McCrary, 418, 558; *Wann vs. Kelly*, 2 McCrary, 628. And your petitioner respectfully submits that the decision of the Circuit Court of Appeals in this cause establishes a different rule in the Ninth Judicial Circuit from that established by the decisions of this Court, and from that which prevails in other circuits, and for such reason said

decision of the Circuit Court of Appeals in this cause should be reviewed and corrected.

Second. Your petitioner further shows, that if the decision of the said Circuit Court of Appeals in this cause were correct with reference to the contract made by the City of Portland with Hoffman and Bates for manufacturing and laying pipe, for the reason assigned therefor, such reason affords no ground for refusing to award your petitioner his share of the profits made on other work performed by your petitioner and said Lee Hoffman, as copartners, for the City of Portland, subsequently to said bidding and to the making of said contract, and entirely independent of them. Your petitioner also shows that in a stipulation of facts, entered into by the parties hereto for the purposes of the appeal, it was admitted (record, vol. 1, p. 119), that there had been earned as "extra work, not under contract, \$14,496.74," and that from a store, boarding laborers, and other sources, "a profit was realized, amounting to \$15,339.76;" and by the decree of the Circuit Court your petitioner was declared to be the half owner of said sums of money, and also of a disputed claim against the City of Portland, amounting to \$16,961.25, which stand in exactly the same case as the item of \$14,496.74 above mentioned, and of other partnership assets, the cost price of which was \$7,857.36; and your petitioner alleges that the decision of the Circuit Court of Appeals is clearly erroneous in not awarding your petitioner a half interest in the items mentioned.

Third. Your petitioner alleges that the finding of said Circuit Court of Appeals, upon which its decision in this

cause rests, viz.: that a corrupt agreement had been entered into between your petitioner and said Lee Hoffman to stifle or suppress competition in bidding for the work for which bids were invited by the City of Portland, of which the work of manufacturing and laying pipe was a part, is wholly unsupported by the evidence, and your petitioner submits that the evidence clearly establishes the contrary, namely, that there was no agreement or action whatever of your petitioner or said Lee Hoffman to stifle, suppress, or in anywise affect free competition in bidding for said work.

Fourth. Said Circuit Court of Appeals found and determined, and so set forth in the opinion filed in said cause, that in consideration of sharing in the profits on work awarded upon the bid submitted by said Lee Hoffman, your petitioner put in a fraudulent bid, higher than he otherwise would have submitted; whereas, the evidence clearly shows that it was never the purpose of your petitioner, or of said Lee Hoffman, to secure, or attempt to secure, any part of the work offered for competition by the City of Portland, as rivals in bidding for the same, or otherwise than as a joint venture entered into for mutual convenience and mutual advantage, without any design to defraud or wrong the City of Portland in anywise.

Fifth. Said Circuit Court of Appeals found and determined, and so set forth in the opinion filed in said cause, that a bid was submitted by your petitioner for the work of manufacturing and laying pipe which was higher in amount than the bid put in by the said Lee Hoffman, in the name of Hoffman & Bates, for the same work; that

said higher bid was submitted with a fraudulent object, for the purpose of deceiving the Water Committee of the City of Portland, and that the fraud, "if any," was in your petitioner and said Lee Hoffman holding themselves out to said committee as rival bidders, when in fact they were not; whereas, the evidence clearly shows that no bid was submitted by your petitioner with any such object or for any such purpose, and that the bid submitted by your petitioner could have had no tendency whatever to deceive said Water Committee, and that your petitioner had no reason to suppose that the submission of said bid would have any such tendency.

Sixth. Said Circuit Court of Appeals found and determined, and so set forth in the opinion filed in said cause, that your petitioner and said Lee Hoffman employed illegal means in order to obtain the award of said contract for manufacturing and laying pipe, by said Water Committee to Hoffman & Bates, and said Circuit Court of Appeals was manifestly influenced in the decision rendered in said cause, by such consideration; whereas, it clearly appears from the evidence therein that the means employed by your petitioner and said Lee Hoffman, in order to procure the award of said contract, were in all respects lawful and honorable.

Seventh. Said Circuit Court of Appeals found and determined, and so set forth in the opinion filed in said cause, that your petitioner was precluded from any recovery therein, for the reason that "the relief prayed for required the Court to investigate" all the transactions found by the Court to have been illegal and fraudulent, as a prerequisite to a

determination in your petitioner's favor ; whereas, the record in said cause clearly shows that your petitioner did not rely for a recovery therein upon any of said transactions, and did not introduce evidence as to any transactions which preceded the formation of the partnership between your petitioner and said Lee Hoffman. Said record shows also that complete proof was made by your petitioner, in said cause, as to the amount of the profits realized in the partnership business carried on by your petitioner and said Lee Hoffman, by introducing in evidence the partnership books, which contained full and complete particulars of all the partnership dealings and transactions, and showed the amount of money received each month from the City of Portland for the work performed by said partnership, the amount expended by said partnership in performing the same, and the balance remaining to the credit of said partnership, at the end of each month, after all of its debts and liabilities had been discharged. Said record shows also (record, vol. 1, p. 172) that your petitioner objected to the introduction of evidence, by the defendant, as to said alleged illegality and fraud in bidding for the work offered for competition by the said City of Portland, on the ground that evidence of transactions which occurred before March 6, 1893, when the partnership between your petitioner and said Lee Hoffman commenced, was irrelevant and immaterial.

As evidence of said alleged illegal and fraudulent transactions could have no tendency to disprove any of the facts necessary to be established by your petitioner in order to entitle him to recover in said cause it is manifest that such evidence could only be admissible, in support of an affirmative defense, in which those transactions were set up as

grounds for relief. It is clearly apparent, therefore, that it was not the relief sought by your petitioner which required the Court to investigate said alleged illegal and fraudulent transactions. His cause of suit was not dependent upon said transactions, or upon any of them. It was the defendant who asked for that investigation, and having induced said Circuit Court of Appeals to undertake it, succeeded in obtaining a reversal of the decree of the Circuit Court in favor of your petitioner, on the ground that said alleged illegal and fraudulent transactions prevented any recovery by your petitioner in said cause.

Your petitioner, being without other or further remedy in the premises, now respectfully presents this, his petition, accompanied by a certified copy of the record in said cause and his brief in support thereof, and prays that a Writ of Certiorari may issue out of this Court, directed to said United States Circuit Court of Appeals for the Ninth Circuit, requiring said Circuit Court of Appeals to certify the record of said cause to this Court for its review and determination.

And your petitioner prays for such other or further relief in the matter, as to this Honorable Court may seem meet.

And your petitioner will ever pray, etc., etc., etc.

JOHN McMULLEN,  
*Petitioner.*

L. B. COX,  
WM. A. MAURY,  
*Counsel for Petitioner.*

UNITED STATES OF AMERICA, }  
Northern District of California. }<sup>88</sup>:

*John McMullen*, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true.

JOHN McMULLEN.

Subscribed and sworn to before me this 16th day of March, 1898.

[SEAL.]

W. B. BEAIZLEY,  
Deputy Clerk U. S. Circuit Court,  
Northern District of California.